Managing Montana's Trust Lands

by Tom Schultz and Tommy Butler

Twenty-two states manage trust lands, yet those 135 million acres receive much less public and academic attention than do public lands under federal management. Comparatively, federal agencies manage about 642 million acres (National Park Service, 80 million acres; Fish and Wildlife Service, 100 million acres; Forest Service, 192 million acres; Bureau of Land Management, 270 million acres).

Maybe that's because of the differing state and federal mandates. National forest and BLM lands are managed under a multiple-use policy that does not require agencies to turn a profit. But state lands are held in trust for the financial benefit of specified state institutions. Constitutionally established land boards (trustees) are required to manage state resources for the exclusive monetary benefit of a specified beneficiary. Given this profit incentive, state trust lands and their permanent funds produce about $4.5 billion for the beneficiaries each year – more than seven times the amount returned to the U.S. Treasury by all federal lands combined (Table 1). Between 1994 and 1996, 10 Western states generated a combined average of $5.56 for every $1 spent managing trust lands, whereas the Forest Service lost 70 cents and the BLM lost 6 cents on every dollar spent managing the national forests and BLM lands (Fretwell 1998).

What is a Trust?

A trust is a legal device that allows property to be held by one party for the benefit of another. Three elements must be present to have a trust: an expression of intent that is enforceable in court, a beneficiary, and a property interest held for a beneficiary. Along these lines, five general principles generally guide trust land management: clarity, undivided loyalty, accountability, enforceability, and perpetuity. Clarity refers to the goal of the trust, which generally refers to the trustees' obligation to manage trust resources for the monetary benefit of the beneficiary. Undivided loyalty means the trustee is forbidden from diverting trust resources to others. The trustee is also accountable to the beneficiary and must keep records and accounts information, and must disclose this information to the beneficiary. The trust's goals are also enforceable because trust doctrine, defined in British and American common law, allows the beneficiary or others with an identifiable interest, to sue to enforce trust terms. Finally, the body or corpus of the trust must be preserved.

Table 1
Federal Lands vs. State Trust Lands

	Acres (Millions)	Annual Revenue ($ Millions)	Returns to Treasuries ($ Millions)
Forest Service	192	1,000	465
BLM	270	187	142
Park Service	80	97	1
Fish & Wildlife Service	90	8	5
State Trusts	135	4,500	3,500

Source: Souder and Fairfax, 1996.

Although Congress intended state school trusts to be perpetual, lawmakers also originally believed that trust lands would be sold to provide revenue. So Congress provided little guidance to states as to how they might, or should, manage their trust lands. The pattern adopted by most states admitted to the Union before 1850 was to sell trust lands and give the money directly to the schools (Souder and Fairfax 1996). After 1850, many states retained ownership of trust lands as a stable source of funding for their educational institutions. Like the federal government since the enactment of Federal Land Policy Management Act (FLPMA), states have experienced a shift in land policy: from a policy of selling trust lands to one of retaining them.

History of the State Trusts

The U.S. Congress established a policy of granting land for the support of schools in new states with the Northwest Ordinance of 1785. The original 13 colonies and the next three states admitted to the Union were not given land grants because there was no federal land within their borders. Ohio was the first state admitted to the Union under the General Land Ordinance of 1785. In Ohio, section 16 in each township was granted directly "to the inhabitants of such township, for the use of schools" (Souder and Fairfax 1996:18).

Because some local townships abused their trust responsibilities, Congress imposed increasingly stringent requirements and eventually made land grants for the benefit of all schools in a state, administered by state governments, and used only for the financial purposes for which they were granted. In

Table 2
State Land Grants

State	Year of Statehood	Acres Granted	Sections Granted	Acres Today	Percent Original
Alabama	1819	911,627	15	0	0
Arizona	1912	8,093,156	2, 16, 32, 36	9,471,000	117
Arkansas	1836	933,778	16	0	0
California	1850	5,534,293	16	587,000	11
Colorado	1876	3,685,618	16, 36	2,858,000	78
Florida	1845	975,307	16	0	0
Idaho	1890	2,963,698	16, 36	2,404,000	81
Illinois	1818	996,320	16	0	0
Indiana	1816	668,578	16	0	0
Iowa	1846	1,000,679	16	0	0
Kansas	1861	2,907,520	16, 36	0	0
Louisiana	1812	807,271	16	0	0
Michigan	1837	1,021,867	16	0	0
Minnesota	1858	2,874,951	16	0	0
Mississippi	1817	824,213	16	0	0
Missouri	1821	1,221,813	16	0	0
Montana	**1889**	**5,198,258**	**16, 36**	**5,132,000**	**99**
Nebraska	1867	2,730,951	16, 36	1,514,000	55
Nevada	1864	2,061,967	16, 36	0	0
New Mexico	1912	8,711,324	2, 16, 32, 36	9,217,000	106
North Dakota	1889	2,495,396	16, 36	723,000	29
Ohio	1803	724,266	16	0	0
Oklahoma	1907	2,044,000	13, 16, 36	785,000	38
Oregon	1859	3,399,360	16, 36	1,438,000	42
South Dakota	1889	2,733,084	16, 36	821,000	30
Texas	1845	0	0	810,000	
Utah	1896	5,844,196	2, 16, 32, 36	3,739,000	64
Washington	1889	2,376,391	16, 36	2,812,000	118
Wisconsin	1848	982,329	16	0	0
Wyoming	1890	3,472,872	16, 36	3,602,000	104

Source: Souder and Fairfax, 1996.

1835, Michigan set up a permanent school trust fund that only distributed interest earned on the permanent fund to the schools.

In Colorado's 1875 Enabling Act, Congress rejected the idea of directly granting land to townships for school sites, and instead insisted that: the trust land be vested in the state as a trustee; the state establish a permanent fund; and that the fund be managed for profit. All new states after Ohio – except Maine, Texas, and West Virginia – received land grants at statehood (see Table 2). Land grants originally only included section 16, but were later expanded to section 36. With the statehood of Utah in 1896, the standard was expanded to four sections and states thereafter received sections 2, 16, 32, and 36 for the common schools. Additionally, some states were granted lands "in lieu of" sections 16 or 36 when those sections were already occupied or privately owned. When Alaska was admitted to the Union in 1958, it was given 25 years to choose 102.5 million acres of unreserved land and 50 years to select an additional 800,000 acres of national forest land near communities. Hawaii was admitted to the Union in 1959 as an independent constitutional monarchy; thus, its trust lands are the result of royal prerogative and bequest.

One of the first prominent court cases involving trust lands was *Ervien v. United States (1919)*. Souder and Fairfax (1996:161) citing the *Skamania* case noted:

"In *Ervien*, the state of New Mexico used funds obtained from trust assets to advertise and promote the state of New Mexico. The state argued that this advertising had the effect of enhancing the prospective prices to be derived from later sales of trust assets, and that the program therefore benefited the trust. The Supreme Court held that this arrangement violated the state's fiduciary duty to the trust, since the funds benefitted both trust lands and non-trust lands."

Another landmark case, which defined the principles of state trust land management, was *Lassen v. Arizona Highway Department (1967)*. Until 1967, state legislatures and courts allowed trust lands to be used for non-revenue-generating

TRAVEL MONTANA

Above: Approximately 80 percent of Montana's 5.2 million acres of trust land is classified as grazing land.

purposes, such as highway rights-of-way. That changed when the U.S. Supreme Court ruled that such actions violated the trust mandate. Said the court: "The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the lands were given."

More recently, in *County of Skamania v. State of Washington (1984)*, the Washington Supreme Court ruled that the state legislature had to comply with state trust duties. In *Skamania v. State of Washington*, the Washington Board of Education and other plaintiffs challenged a statute that allowed timber purchasers to default on contracts if timber prices were too low. Citing both *Ervien* and *Lassen*, the Washington Supreme Court said the Enabling Act did not allow trust revenue or trust assets to be utilized for non-trust purposes, no matter how meritorious the programs. The court also said that a trustee must manage trust assets prudently and with undivided loyalty to the best financial interests of the beneficiary. And no prudent trustee could find that termination of timber contracts was in the interest of the trust. Finally, the court said the state statute allowing default on timber contracts "falls far short of the state's constitutionally imposed duty to seek 'full value' for trust assets."

DNRC

Hampton Inn on state land in Great Falls.

Additionally, in *Montana Department of State Lands v. Pettibone (1985)*, the Montana Supreme Court said three important principles govern school trust lands: that enabling acts created trusts similar to a private charitable trust which the state could not abridge; that enabling acts were to be strictly construed according to fiduciary principles, and that enabling acts preempt state laws or constitutions. In holding that water rights developed on state land should always belong to the school trust, the Montana Supreme Court adopted the reasoning of *Skamania v. Washington* and boldly proclaimed that "any infringement on the use or management prerogatives of the state that effectively devalue school lands is impermissible."

These cases appear to indicate that a trustee has little discretion to manage for general benefits outside of the beneficiary. However, strict scrutiny of the Washington and Montana constitutions has led some to question for whom trust lands are to be managed. The Enabling Act of 1889, under which Washington and Montana were admitted to the Union, states: "That upon admission of each of said states into the Union, sections numbered 16 and 36 in every township of said proposed states…are hereby granted to said states for the support of common schools."

Even though the Enabling Act of 1889 specifies that land grants be managed to support common schools, states may have slightly different constitutional provisions. In Washington, and similarly in Montana, the state Constitution says "all lands granted [under the Enabling Act of 1889] are *held in trust for all the people*." Article X of the Montana Constitution states: "All lands of the state…granted by Congress …shall be *public lands of the state*. They shall be *held in trust for the people*…for the respective purposes for which they have been or may be granted."

Table 3
Revenue Generated for the Trusts and Permanent Fund Balances in Fiscal Year 2003

	Distributable – Revenue –	Permanent Fund (Non-distributable Revenue)		
Trust	2003 Revenue	2003 Revenue	2003 TAC Expenses	Current Balance
Common Schools	$43,672,110	$2,355,861	$3,669,482	$381,058,565
University of MT	192,587	17,496	3,538	1,495,503
Montana State University – Morrill Grant	347,154	85,514	0	2,984,782
Montana State University – Second Grant	836,822	768,110	74,467	8,111,574
Montana Tech of UM	677,348	712,025	34,762	4,527,556
State Normal School	562,775	234,968	61,247	5,852,146
School for the Deaf and Blind	282,040	168,447	30,578	2,869,965
State Reform School – (Pine Hills)	348,803	154,777	23,837	2,754,679
Veterans' Home	6,759	0	0	16,742
Public Buildings	771,933	NA	85,162	NA
Totals	$47,698,331	$4,497,1998	$3,983,073	$409,671,512

Source: Montana Department of Natural Resources and Conservation 2003a.

Considerable debate has surfaced recently regarding the focus and purpose of the trust mandate. In *Ravalli County Fish & Game v. DSL (1995)*, the Montana Supreme Court held that: "Income is a consideration – not the consideration regarding school trust lands. Maximizing income is not paramount to the exclusion of wildlife or environmental considerations *in the MEPA context*." Regarding this point, Souder and Fairfax (1996:167) write:

"…hard-edged rules from court cases that seem to indicate that the trustee has little discretion to manage for general public benefits; and statutory and constitutional language in the four key states suggest, at the very least, that the hard edges are starting to get a little soft. At a minimum, ample room exists in the available [constitutional] language to identify a clear tension between the state's duty of undivided loyalty to the beneficiary and its obligations to the general public of the state."

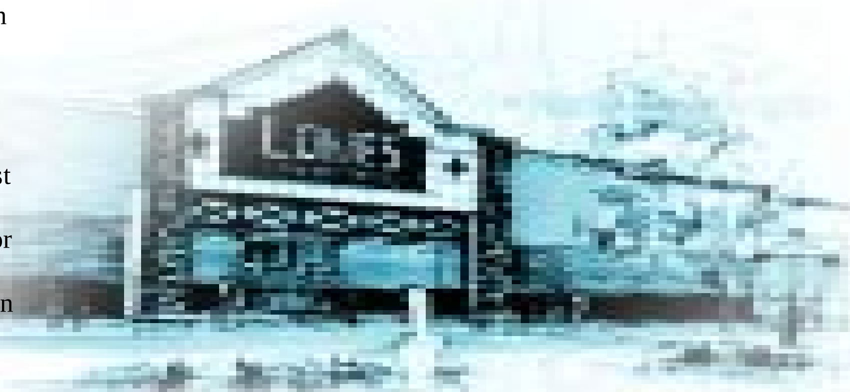
Mortimer (1999: 251-252) disagrees with Souder's assessment when applied to Montana, and states, "The argument that state trust land law is built upon a foundation of sand does not ring true in Montana – Montana courts (*Bickford, Mantle, Pettibone)* have independently reached the conclusion that the school trust lands are assets to be managed as such." To date, no Montana case law has expressly stated that trust assets may be utilized for non-trust purposes.

Any doubt that state trust lands must be utilized solely for the financial support of the trust beneficiary vanished in 1999 when the Montana Supreme Court issued its opinion in *Montanans for Responsible Use of the School Trust v. State of Montana*, commonly known as the *Montrust* case. The court held that any statute affecting state trust lands must be "consistent with the constitutional mandates of the trust and the state's fiduciary duties as a trustee." The court also confirmed that the state's management of trust lands would be judged by principles applicable to private trusts and described that duty as follows:

"When a party undertakes the obligation of a trustee to receive money or property for transfer to another, he takes with it the duty of undivided loyalty to the beneficiary of the trust. The undivided loyalty of a trustee is jealously insisted on by the courts, which require a standard with a 'punctilio of an honor the most sensitive.' A trustee must act with the utmost good faith towards the beneficiary, and may not act in his own interest, or in the interest of a third person."

Beneficiaries and Revenues

The original common school grant in Montana was for 5,188,000 acres, with an additional 668,720 acres granted for other endowed institutions. In 2004, Montana's trust land



GOLDBERG PROPERTIES INC.
Artist rendering of Lowe's in Kalispell on state land.

Table 4
Trust Net Revenue by Source

Source	FY2001	FY2002	FY2003
Agriculture and Grazing	$13,127,720	$12,097,023	$13,072,974
Forest Management	$3,531,233	$4,996,012	3,138,699
Minerals Management	$20,147,435	$8,745,150	11,310,736
Special Uses	$982,423	$1,097,211	1,206,388
Total	$37,788,811	$26,935,396	$28,728,797

Note: Table includes reductions for production costs but does not include reductions for fund reallocations e.g. Permanent Fund.
Source: Montana Department of Natural Resources and Conservation 2003b.

Table 5
FY 2003 Trust Net Revenue/Acre

Management Activity	FY03 Net Revenue/Acre	Percentage of Classified Land Base
Grazing	$1.25	79%
Timber	$7.00	9%
Agriculture	$14.00	11%
Special Uses	$55.00	<1%

Source: Montana Department of Natural Resources and Conservation 2003b.

acreage totals more than 5.1 million surface and 6.2 million mineral acres. Whereas 90 percent of the trust land surface ownership is dedicated to the common schools (K-12), nine other trusts receive revenue from a variety of land management activities. Table 3 depicts all of the trust beneficiaries and the revenue (including interest earned from the permanent fund) distributed to them in fiscal 2003. The revenue represented about 10 percent of the common schools' fiscal year 2003 state-funded budget.

Table 4 displays total net revenue by land management activity. As is evident in the data, the greatest amount of revenue is generated from agriculture and grazing, followed by minerals, timber, and special uses. This makes sense since grazing lands comprise almost 80 percent of the 5.2 million surface acres managed by the Montana Department of Natural Resources and Conservation (DNRC). Agricultural ground comprises about 11 percent of the surface acres, forested acres comprise about 9 percent, with special uses (cabin sites, residential housing, commercial and industrial leases) comprising less than 1 percent of the land base.

Table 5 displays the fiscal year 2003 trust net revenue per classified acre. The greatest return per acre was generated from special use activities; yet those acres comprise less than 1 percent of the total land base. The lowest return per acre was generated from grazing and those lands comprise almost 80 percent of the land base. It does not take a certified financial planner to see that Montana's asset portfolio is not very diversified. That lack of diversification contributes to the overall rate of return (including appreciation) generated on asset value, which equates to about 3.1 percent annually. The asset value of Montana's trust lands is valued at approximately $3.3 billion, which eclipses the $410 million balance in the permanent fund.

Poised for the Future

As trust managers, the Trust Land Management Division of DNRC is first and foremost an asset management organization. Whereas the division has historically managed for natural resource extraction, the data supports broadening those land-use activities to include uses that generate greater revenue per acre. Invariably, that means rearranging the asset portfolio from one that is overly reliant on grazing and acquiring or developing lands that have the potential for commercial, industrial, residential, and conservation leasing opportunities. This shift has already begun, albeit on a small scale.

Last Oct. 20, the Montana Board of Land Commissioners approved a 50-year lease of 17.25 acres of state land near Kalispell for development of a commercial retail center, including a Lowes Home Improvement Store (page 11). The lease will generate $113,000 per year ($6,600 per acre annually) for 20 years, with incremental adjustments for inflation. Previously, the land was farmed and generated about $12 per acre. In June 2003, a Hampton Inn opened in Great Falls on state land; the hotel will generate about $26,000 per year on four acres.

Now, the DNRC is negotiating a conservation easement with the Montana Department of Fish, Wildlife and Parks for about $1.5 million – for the development rights on about 3,000 acres on the Blackfoot-Clearwater Wildlife Management Area. DNRC will continue to manage timber resources on the game range under a cooperative management plan. The potential for commercial, residential, industrial, or conservation leasing will largely be driven by market forces and DNRC's ability to act in a timely and efficient manner to capture those markets.

In an effort to chart a vision for the future of trust land management, DNRC contracted with The University of Montana's Bureau of Business and Economic Research to predict changes in population and personal income in Montana.

By 2025, the Bureau estimates that about 1.16 million people will live in Montana, most within the Central Land Office boundary (Great Falls, Helena, Bozeman, Dillon). Populations in the Northeastern (Lewistown, Glasgow, Havre) and Eastern (Miles City, Glendive, Forsyth) Land Office boundaries are projected to decline by 2025. Populations in and around Billings, Missoula, and Kalispell also are projected to increase by 2025 (Table 6).

BBER researchers believe the fastest-growing region of the state will be northwest Montana (Whitefish, Kalispell,

Table 6
Montana's Population and Personal Income by DNRC Administrative Units

	2000	2005	2010	2015	2020	2025
Helena (Central Land Office)						
Total Population (Thousands)	285.947	299.152	314.599	330.854	347.833	365.603
Nonfarm (2000$)	4356.938	4874.543	5426.837	6031.103	6688.235	7400.338
Personal Income (2000$)	6675.899	7492.185	8315.139	9226.091	10232.15	11342.61
Lewistown (Northeastern Land Office)						
Total Population (Thousands)	79.729	78.045	77.427	77.038	76.827	76.759
Nonfarm (2000$)	780.9301	841.0773	895.4572	955.1436	1021.024	1093.873
Personal Income (2000$)	1623.32	1778.706	1887.169	2006.997	2139.767	2286.971
Miles City (Eastern Land Office)						
Total Population (Thousands)	48.009	47.284	47.287	47.434	47.647	47.952
Nonfarm (2000$)	614.0316	691.2994	749.6756	810.4909	873.7881	939.6587
Personal Income (2000$)	1005.657	1114.331	1195.929	1283.1	1376.428	1476.557
Missoula (Southwestern Land Office)						
Total Population (Thousands)	190.216	201.85	216.04	230.708	245.88	261.605
Nonfarm (2000$)	2823.635	3205.967	3625.74	4079.458	4575.769	5122.715
Personal Income (2000$)	4204.705	4761.363	5428.98	6165.806	6980.874	7883.929
Billings (Southern Land Office)						
Total Population (Thousands)	169.039	177.638	186.731	196.342	206.354	216.874
Nonfarm (2000$)	2806.167	3110.595	3427.488	3775.578	4158.862	4582.348
Personal Income (2000$)	4124.626	4581.462	5059.633	5589.857	6179.485	6837.376
Kalispell (Northwestern Land Office)						
Total Population (Thousands)	130.476	142.142	154.293	166.84	179.68	193.044
Nonfarm (2000$)	1672.308	1928.284	2186.427	2462.842	2761.298	3085.053
Personal Income (2000$)	2704.567	3119.867	3554.505	4030.762	4556.282	5138.89
Montana						
Total Population (Thousands)	903.416	946.111	996.377	1049.216	1104.221	1161.837
Nonfarm (2000$)	13054.01	14651.77	16311.63	18114.62	20078.98	22223.99
Personal Income (2000$)	20338.77	22847.91	25441.36	28302.61	31464.98	34966.34

Source: Bureau of Business and Economic Research, The University of Montana-Missoula.

Bigfork, Polson) at 48 percent, followed by southwest Montana (Missoula, Hamilton, Anaconda, Lincoln) at 37.5 percent, and central Montana (Shelby, Great Falls, Helena, Bozeman, Dillon) and southern Montana (Billings, Red Lodge, Big Timber), both at 28 percent. Statewide, growth is projected to increase by almost 29 percent between 2000 and 2025 (Table 7). DNRC will eventually utilize a forecast of Montana's total population growth to describe the services required to support that growth (schools, housing, retail, professional, industrial, conservation, infrastructure, etc.) that could occur on state trust lands. As a result, DNRC intends to increase returns to state trusts, while also complementing the growth policies of local communities.

Whereas most of the public's association with state trust lands revolves around recreational use and hunting, the mandate for management of trust lands extends far beyond recreation or agricultural production. The Montana Constitution confers to the Board of Land Commissioners the authority "to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be

Table 7
Montana's Projected Population Growth Rates 2000-2025 by DNRC Administrative Units

	2000 Population	2025 Population	Projected Growth Rate
Central Land Office	286,947	365,603	28%
Northeastern Land Office	79,729	76,759	-4%
Eastern Land Office	48,009	47,952	-0.1%
Southwestern Land Office	190,216	261,605	37.5%
Southern Land Office	169,039	216,874	28%
Northwestern Land Office	130,476	193,044	48%
Montana (statewide)	903,416	1,161,837	28.6%

Source: Bureau of Business and Economic Research, The University of Montana-Missoula.

provided in law. Montana Code Annotated 77-1-202 directs the Board of Land Commissioners to "administer this trust to secure the largest measure of legitimate and reasonable advantage to the state."

It is clear that trust lands are to be managed with undivided loyalty to the beneficiaries. Still, the State Land Board retains considerable discretionary power over how the management of trust lands will occur. The Land Board is comprised of the governor, attorney general, secretary of state, superintendent of public instruction, and the state auditor. Each individual brings their own values and perspective on the management of state lands. Additionally, employees within DNRC bring their own expertise and background, which directly affects how management activities are carried out on the ground. Finally, the public and the trust beneficiaries have a say in how state trust lands are managed. The DNRC works with the public, the Land Board, and its own staff to manage state lands to generate reasonable and legitimate revenue for the various trust beneficiaries.

It is in this spirit of cooperation and innovative land management perspective that the DNRC will continue into the future, adjusting the state's land management portfolio to best serve the financial needs of the beneficiary institutions. Consistent with modern asset-allocation principles, lands with low potential as revenue producers may be sold and land with the potential to generate greater revenue will be acquired. Trust administration will become increasingly cost-efficient. However, this greater awareness of value and return to the various trusts will not come to the detriment of values that Montanans hold dear. DNRC will work to develop projects that maintain open space, recreational opportunities, and traditional resource management activities.

The landscape and demographics of Montana are changing. Increased population brings a greater demand for services, introduction of new values, and a longing for the past. DNRC recognizes these changes and will develop a thoughtful and responsible vision for managing Montana state trust lands into the future – both to the advantage of trust beneficiaries and the general public.❑

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